DATO' HJ NIK MAHMUD DAUD

v.

BANK ISLAM MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: D-02-656-95]
8 JUNE 1998

LAND LAW: *Charge - Malay reservations - Whether creation of charges contravened Malay Reservations Enactment of Kelantan 1930 - Whether charges null and void - Malay Reservations Enactment of Kelantan 1930, ss. 7, 12*

The appellant, a Malay native of Kelantan, had applied for an order that the charges executed in favour of the respondent (a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business which is to provide financing facilities under the ABBA (Al Bai Bithaman Ajil)) in respect of some land be declared null and that the memorandum of charges registered with the Director of Lands and Mines, Kota Bharu, Kelantan be cancelled. The appellant had also applied for an order that the property sale agreement ('the PSA') and the property purchase agreement ('the PPA') executed by the parties be declared null and void and of no effect and that the respondent be ordered to return the titles of the land free of all encumbrances to him.

Under the PPA, the respondent had purchased the land for RM520,000 but resold the same under the PSA to the appellant for RM629,000. Two days later the charges for the land were executed in favour of the respondent as security for the loan of RM629,000 granted under the ABBA.

The appellant raised two issues (the first having been abandoned), the second being that the execution of the PPA, the PSA and the charge documents amounted to a colourable exercise to defeat the purpose and intention of the Malay Reservations Enactment 1930 of Kelantan ('the Enactment') which in s. 7(i) generally prohibits any transfer or transmission or vesting of any right or interest of any Malay in reservation land to or in any person not being a Malay.

Held:
Per Abdul Malek Ahmad JCA

[1] On a fair reading of the Enactment, the intention of the Legislature was to preclude the Malays from parting with their rights and interests in reservation land. To ensure achieving this intention, certain forms of statutory prohibition have been incorporated in the Enactment in the form of s. 7 with consequences being highlighted in s. 12 should there be any infringement thereof.

[2] It was never the intention of the parties to involve any transfer of proprietorship. The execution of the PPA and the PSA constituted part of the process required by the Islamic banking procedure before a party could avail itself of the financial facilities provided by the respondent. This would account for the contemporaneous execution of the two agreements, and therefore the PPA would be rendered otiose and bereft of any consequential value the moment the PSA was signed.

[3] When the PSA was signed, the right which would be acquired under the agreement at that point of time, since the agreement was still executory, was only a right to a registrable interest which right had yet to crystallise into a registrable interest. The acquisition of such a right however would confer on the respondent an *in personam* right against the appellant which would entitle the former to bring an action for specific performance in the event of the latter refusing to go along with the agreement.

[3a] Assuming that a decree of specific performance was granted by the court, such decree would be effective to achieve a statutory title only upon the appropriate instrument of transfer being registered as required under the National Land Code 1965 as otherwise the decree would remain inefficacious.

[4] In this case there was no evidence to show that there was at any time a change in the registered proprietorship of the land pursuant to the execution of the PPA. All along the appellant was the registered proprietor. That being the case there was no transfer being effected and the proprietorship still remained with the appellant.

[5] The charge documents did not disclose any form of defect or illegality. They were registered in accordance with the procedure laid down in the National Land Code 1965 and such registration did not run counter to the Enactment either – this was so by virtue of s. 9A of the Enactment and with the inclusion of the respondent in Sch 26A of the Enactment.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, seorang Melayu dan bumiputera Kelantan, telah memohon untuk suatu perintah bahawa gadaian bagi pihak responden (sebuah bank berlesen di bawah Akta Perbankan Islam 1983 untuk mengendalikan perniagaan perbankan Islam untuk memperuntukkan kemudahan kewangan di bawah ABBA (Al Bai Bithaman Ajil)) berkenaan sebidang tanah diisytiharkan sebagai terbatal dan bahawa memorandum gadaian yang didaftarkan dengan Pendaftar Tanah dan Galian, Kota Bahru, Kelantan dibatalkan. Perayu juga telah memohon untuk suatu perintah bahawa Perjanjian Jualan Harta ('PJH') dan Perjanjian Pembelian Harta ('PPH') yang dilaksanakan oleh pihak-pihak diisytiharkan sebagai terbatal dan tak sah dan tidak berkesan dan akibat dari kedua-dua permohonan ini, responden diperintahkan supaya mengembalikan hakmilik tanah tersebut bebas dari sebarang sekatan.

Di bawah PPH, responden telah membeli tanah tersebut untuk RM520,000 tetapi telah menjualnya kembali di bawah PJH kepada perayu untuk RM629,000. Dua hari kemudiannya gadaian terhadap tanah tersebut telah dilaksanakan bagi pihak responden sebagai security untuk pinjaman sejumlah RM629,000 yang diberikan di bawah ABBA.

Perayu telah membangkit dua isu (yang pertamanya telah diabaikan), yang keduanya adalah bahawa perlaksanaan PPH, PJH dan dokumen gadaian adalah untuk mencabar niat dan tujuan Enakmen Rizab Melayu 1930 ('Enakmen tersebut') yang menurut s. 7(i) secara amnya melarang sebarang pindahmilik ataupun pemindahan ataupun perletakanhak sebarang hak atau kepentingan seorang Melayu dalam tanah rizab kepada ataupun ke dalam seorang yang bukan berbangsa Melayu.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Menurut suatu bacaan adil Enakmen tersebut, niat badan Perundangan dalam menggubal Enakmen tersebut adalah untuk melarang orang-orang Melayu daripada berpisah dengan hak-hak dan kepentingan mereka dalam tanah rizab. Untuk menentukan bahawa niat ini dipenuhi, larangan statutori yang khas telah dimasukkan ke dalam Enakmen dalam bentuk s. 7 dengan implikasinya yang diberi penekanan dalam s. 12 Enakmen tersebut jikalau berlakunya pelanggarannya.

[2] Ianya tidak pernah menjadi niat pihak-pihak untuk melibatkan sebarang pemindahan hakmilik. Perlaksanaan PPH dan PJH adalah sebahagian dari proses yang diperlukan oleh prosedur perbankan Islam sebelum sesuatu pihak dapat memperolehi kemudahan kewangan yang diperuntukkan oleh responden. Oleh sebab itulah terdapatnya perlaksanaan dua perjanjian yang berlaku pada masa yang sama dan oleh itu PPH akan menjadi tidak perlu dan tidak ada implikasinya ketika PJH ditandatangani.

[3] Ketika PJH ditandatangani, hak yang akan diperolehi di bawah perjanjian pada masa itu, oleh kerana perjanjian tersebut masih adalah eksekutori, hanyalah hak kepada kepentingan berdaftar yang mana hak tersebut belum lagi terjumlah kepada kepentingan berdaftar. Pemerolehan hak tersebut akan memberikan responden suatu hak *personam* terhadap perayu yang akan membolehkan responden membawa suatu tindakan untuk perlaksanaan tertentu jikalau perayu enggan memenuhi perjanjian tersebut.

[3a] Kalaupun dianggap bahawa suatu dekri perlaksanaan tertentu diberikan oleh mahkamah, dekri tersebut akan berkesan untuk mendapatkan hakmilik statutori hanya apabila instrumen pindahmilik yang wajar seperti yang diperlukan oleh Kanun Tanah Negara 1965; jikalau tidak dekri tersebut akan terus menjadi tidak berkesan.

[4] Dalam kes ini tidak ada keterangan untuk menunjukkan bahawa adanya pada bila-bila masa suatu pertukaran dalam hakmilik berdaftar tanah tersebut menurut perlaksanaan PPH. Sepanjang masa perayu adalah tuanpunya berdaftar. Maka dengan itu tidak terdapatnya suatu pindahmilik dan hakmilik masih berada dengan perayu.

[5] Dokumen gadaian tidak memperlihatkan sebarang kecacatan ataupun ketidaksahan. Dokumen gadaian telah didaftarkan menurut prosedur yang terdapat dalam Kanun Tanah Negara 1965 dan pendaftaran tersebut juga tidak melanggar Enakmen – ini adalah berdasarkan s. 9A Enakmen tersebut dan kemasukkan responden dalam Jadual 26A Enakmen tersebut.

[Rayuan ditolak.]

Cases referred to:
Foo Say Lee v. Ooi Heng Wai [1969] 1 MLJ 47 ***(refd)***
Hj Hamid Ariffin & Anor v. Ahmad Mahmud [1976] 2 MLJ 79 ***(refd)***
Ho Giok Chay v. Nik Aishah [1961] 27 MLJ 49 ***(refd)***
Hussanjan v. Hj Nik Yahya Nik Daud & Ors [1973] 1 MLJ 9 ***(refd)***
Manang Lim Native Sdn Bhd v. Manang Selaman [1986] 1 MLJ 379 ***(refd)***
Tengku Mohamed Zairuddeen Tengku Mohamed Zaid v. Wazuraiyah Mohamed [1988] 1 MLJ 27 ***(refd)***

Legislation referred to:
Malay Reservations Enactment 1930 [Kelantan], ss. 3, 4, 7, 9A, 12, 13A
National Land Code 1965, s. 340

For the appellant - Joseph Yeo; M/s AJ Ariffin, Yeo & Harpal
For the defendant - Mohamed Ismail Shariff (K Thavakumar with him); M/s Mohamed Ismail & Co

[Appeal from High Court, Kota Bharu; Originating Motion No: 25-26 of 1994]

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Malek Ahmad JCA:

The appellant, who was the plaintiff in the court below, had applied by originating motion dated 5 October 1994 for an order that the charges dated 8 May 1984 executed by his attorney in favour of the defendant, who is the respondent before us, in respect of twenty five lots of land registered as PT 109 (H.S.(D)) K.B. 645/83, PT 110 (H.S.(D)) K.B. 646/83, and from PT 113 (H.S.(D)) K.B. 649/83 to PT 135 (H.S.(D)) K.B. 671/83, all in Section 12, Kota Bharu, Kelantan (hereinafter "the properties") be declared null and void and of no effect and that the memorandum of charge registered under Charge No: Jilid 39, Folio 36, Bil Perserahan No. 109/83 and Charge No: Jilid 39, Folio 37, Bil Perserahan No. 1092/84 with the Director of Land and Mines, Kota Bharu, Kelantan be cancelled.

He had also applied for an order that the Property Sale Agreement and the Property Purchase Agreement executed by the parties dated 6 May 1984 be declared null and void and of no effect and that consequent to both these prayers, the respondent be ordered to return the titles of the properties, free of all encumbrances, to him.

Under the Property Purchase Agreement, the respondent had purchased the properties for RM520,000 but after having so purchased, under the Property Sale Agreement they were resold to the appellant for RM629,000 resulting in a profit of RM109,200. These two agreements were entered into on 6 May 1984. Two days later, the appellant's attorney executed the charges on the properties in favour of the respondent as security for the loan of RM629,200 purportedly granted under the Islamic Banking Concept of Al Bai Bithaman Ajil (hereinafter "ABBA').

In support of the motion, the appellant raised two issues. The first was that the respondent was at all material times prohibited from accepting charges in respect of usury transactions. In consequence, the acceptance of the charges by the respondent in this instance was *ultra vires* its Articles of Association. However, this issue was abandoned at the outset of the hearing.

The second issue was that the execution of the Property Purchase Agreement, Property Sale Agreement and the charge documents amounted to a colourable exercise to defeat the very purpose and intention of the Malay Reservations Enactment 1930 of Kelantan (hereinafter "the Enactment") and the National Land Code (hereinafter 'the Code").

On this issue, learned counsel for the appellant argued that the execution of the Property Purchase Agreement had contravened the provisions of ss. 7(i) and 12 of the Enactment and accordingly the court ought to declare that the dealing is null and void and that the creation of the charges by the appellant would be of no effect and should be set aside.

Section 7(i) of the Enactment provides:

> 7.(i) No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of Section 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-sections (ii) to (v) below, save as provided in this Enactment.

Reference is made in that provision to s. 13A of the Enactment and it is therefore necessary to set it out here:

> 13A. (i) His Highness the Ruler in Council may approve
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> (a) the alienation of any State Land included in a Malay Reservation,
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> (b) the transfer or transmission of the right or interest of any Malay in reservation land, and
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> (c) the transfer or transmission of any reservation land acquired by virtue of this section, by any person not being a Malay,
>
> to any other person not being a Malay, subject to the imposition of such restriction in interest and such conditions in the document of title and such terms of rent as he may think fit: and the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, under the Land Enactment may be registered if presented with a certificate signed by the State Secretary in the form of Schedule C.
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> Upon registration such certificate shall be attached to the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be.
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> (ii) Upon registration of such Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, the land affected thereby shall remain subject to all the provisions of the Malay Reservations Enactment.

(iii) Nothing in this section shall prevent the transfer or transmission of the right or interest in reservation land of any person not being a Malay to any other person not being a Malay always provided that such right or interest shall have been acquired prior to the creation of the Malay Peservation in which the land is included.

From the wording in s. 7(i) of the Enactment, it is clear that it prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. The question arises as to whether the Property Purchase Agreement confers on the respondent any registered title in the properties.

As for s. 12 of the Enactment, the said section reads as follows:

12.(i) All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void.

(ii)(a) No money paid or valuable thing handed over in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation land contrary to the provisions of this Enactment shall be recoverable;

(b) No action shall lie for breach of contract in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation land contrary to the provisions of this Enactment.

(iii) No Land Officer shall register any dealing which is null and void under this section and if any such dealing is registered upon application being made in a summary way to the High Court by any party interested or by the Superintendent of Lands or by a District Officer such Court may subject to the rights of any *bona fide* purchaser for value order that such dealing be deleted from the register.

It is not disputed that the appellant is a Malay as defined under s. 3(i) of the Enactment and also a native of Kelantan. Section 3(i) of the Enactment states:

3.(i) "Malay" means a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; and shall include (a) the Majlis Ugama lslam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay.

It is also common ground that the respondent is a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business which is to provide financing facilities under the concept of ABBA. As a prerequisite, this concept involves the purchase of the properties by the respondent from the appellant and the immediate resale of the same to the appellant. The issue that requires to be answered, guided by both the Enactment and the Code, is the effect of such sale in the eyes of the law.

Further, there is no quarrel that the properties are lands declared under s. 4 of the Enactment to be included in a Malay Reservation. The said s. 4 provides:

> 4. (i) His Highness the Sultan in Council may by notification declare any area of land to be a Malay Reservation.
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> (ii) Such notification shall describe the boundaries of such area of land with reasonable accuracy but it shall not be necessary for the purposes of such notification to survey the area therein referred to.
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> (iii) His Highness the Sultan in Council may also by notification –
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> (a) alter the boundaries of any Malay Reservation; or
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> (b) revoke any notification made under sub-section (i) either as to the whole or any part of the area therein referred to; or
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> (c) include in any Malay Reservation any land excluded therefrom.
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> (iv) Any notification under this section shall take effect from a date to be specified in the notification.
>
> (v) Any land whether State Land or land held under permanent or temporary title may be included in a Malay Reservation.

It is also agreed that the respondent is neither a Malay nor a native of Kelantan and is a party included in Sch. D to the Enactment and Sch. 26A to the Land Enactment 1938.

The parties also confirm that a power of attorney was given by the appellant in favour of one Tengku Mahyuddin who signed the charges in Form 16A on behalf of the appellant in the exercise of the said power. The said charges were presented and registered on 8 May 1984.

Learned counsel for the respondent in resisting the motion had raised the question of indefeasibility under s. 340 of the Code, the interpretation of the Enactment *vis-a-vis* ABBA transactions and the applicability of equitable principles to the facts of the case.

At p. 12 of his judgment, the learned trial judge said:

> To my mind when the Property Purchase Agreement was signed the right that could be acquired under the agreement at that point of time, since the agreement being still executory, was only a right to a registrable interest which right is yet to crystalise into a registrable interest. The acquisition of such right, however, would confer on the defendant an *in personam* right against the plaintiff which would entitle the former to bring an action for specific performance in the event of the latter refusing to go along with the agreement.

> And assuming that a decree of specific performance would be granted by the court, such decree would be effective to achieve a statutory title only upon appropriate instrument ie, the instrument of transfer, being registered as required under National Land Code as otherwise the decree would remain inefficacious.

It may be appropriate to mention at this stage that the appellant had alleged that the loan of disbursed to him but the learned trial judge had immediately rejected the allegation in view of cls. 1(a) and 2(a) of the Financing Facility Agreement dated 6 May 1984 executed by the appellant, Mariza Sdn. Bhd. and the respondent. The relevant excerpt of the judgment of the learned trial judge states:

> It is also alleged by the plaintiff that the loan was never disbursed to him but as I see it on the strength of the Financing Facility Agreement dated 6.5.84 executed by the plaintiff, Mariza Sdn. Bhd. and the defendant and in particular to Clauses 1(a) and 2(a) thereof, such an allegation can be brushed aside as having no basis at all. Clauses 1(a) and 2(a) are set out below:
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> > 1(a) At the request of the First-named Customer (the plaintiff and the Second-named Customer (Mariza Sdn. Bhd.) the Bank (the defendant) hereby agrees to pay the Purchase Price payable by the Bank to the First-named Customer under the Property Purchase Agreement to the Second-named Customer and upon the terms and conditions herein contained.
> >
> > 2(a) In consideration of the Bank agreeing to pay the Purchase Price mentioned in Clause 1(a) hereof to the Second-named Customer with the concurrence of the First-named Customer, the Second-named Customer hereby covenants agrees and undertakes with the Bank and the First-named Customer that the Second-named Customer shall in place of the First-named Customer pay to the Bank the Purchase Price payable by the First-named Customer under the Property Sale Agreement (hereinafter called 'the Purchase Price') in the amounts, at the times and in the manner specified in Section 1 of the Second Schedule hereto or by instalments of such other amounts as shall be mutually agreed between the Customer.
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> As such and in the absence of any evidence to the contrary, it does not now lie in the plaintiff's mouth to deny the arrangements that have therefore been agreed upon between the said parties, more so when the loan had already been disbursed to the "Second-named Customer".

Before us, proceedings began with a preliminary objection by learned counsel for the respondent as out of the six grounds of appeal, the first three related to the first issue which had been dropped in the court below. Learned counsel for the appellant had readily conceded to this and we consequently upheld the objection.

Pertaining to the second issue, learned counsel for the appellant referred to s. 9A of the Enactment which states:

> 9A. (1) Notwithstanding anything hereinbefore contained the proprietor of any reservation land may charge such land or any part thereof to any person specified in Schedule D, and may in favour of any such person create, subject to the Land Enactment a lien by deposit of the issue document of title for such land.
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> (2) His Highness the Sultan in Council may from time to time by order published in the Gazette add to, delete from or amend Schedule D.

The respondent is listed in Schedule D.

Accordingly, he submitted that the transactions required the approval of His Highness the Ruler in Council as provided in s. 13A of the Enactment. It was his contention that the word "transfer" in s. 7(i) of the Enactment is capable of a wider sense and there is no necessity for a physical transfer. In case of sale, he added, there must be a passing of property, otherwise there was nothing to resell.

He had cited *Ho Giok Chay v. Nik Aishah* [1961] 27 MLJ 49 where the applicant, who claimed to be a "native of Kelantan" within the meaning of the definition section of the Land Enactment 1938 of Kelantan (hereinafter "the Land Enactment) but not a Malay, obtained three charges in succession from the respondent, a Malay, over her land, which was Malay Reservation land, to secure repayment of certain loans made to her. The charges were duly registered under the provisions of the Land Enactment. The respondent having defaulted in payment of principal moneys and interest secured by the three charges, the applicant took out a summons to show cause why the land should not be sold for realisation of the debts and for an order for sale. The respondent contended that the charges were null and void as being contrary to the Enactment.

It was held that s. 7(i) of the Enactment precludes a non-Malay from acquiring any right or interest in reservation land, other than leases for limited periods, by transfer or transmission nor can any such right or interest be vested in a non-Malay. It was also held that the power given to a chargee under s. 136 of the Land Enactment to compel sale of charged land creates a right to or interest in the land in favour of the chargee, the word 'transfer' has a wide meaning and comprehends a transfer by way of assignment, security or otherwise, and therefore, a charge under the Land Enactment transfers or vests a right or interest to or in he land in the chargee; otherwise a charge would be valueless and of no effect, the essential element being that the chargee is entitled to reimburse himself out of the land, that is to compel payment of the amount due by sale of the land itself.

The court also ruled that s. 9A(1) of the Enactment, incorporated by Federal Ordinance No. 25 of 1954, lifts the prohibition against charging reservation land in favour of some defined persons who are non-Malays, the object of the amendment being to remove the absolute fetter created by s. 7(i) of the Enactment. Consequently, the applicant not being within the exempting provisions of s. 9A of the Enactment, the charges were held to be null and void under s. 12(i) of the Enactment.

At p. 51 of the report, Hepworth, J said:

> I do not think that there is any difficulty over the words "transfer" and "vest". We are not concerned here with transmissions which are dealt with in Part II of the Land Enactment and relate to death or disability. The operative word "transfer" is one of the widest terms that can be used (per James LJ in *Gathercole v. Smith* (17 Ch. D. 1)). Transfer (for example of a debt) does not necessarily mean absolute transfer but may be a transfer by way of assignment, security or otherwise (per Cotton LJ in *In re Combined Weighing Co.* (43 Ch. D 99)). "Vest", in the absence of a context, is usually taken to mean vest in interest rather than vest in possession (per Romer J in *Re Lord's Settlement* [1948] LJR 207; [1947] 2 All ER 685)). See also observations of Brett LJ in *Coverdale v. Charlton* (48, LJ QB 132)).
>
> I do not think that there can be any doubt that a charge under the Land Enactment transfers or vests a right or interest in something to or in the chargee. If it did not a charge would be valueless and of no effect. But the question with which we are concerned is not whether a charge transfers or vests a right or interest to or in the chargee but whether that right or interest is a right or interest in land.

Learned counsel for the respondent reiterated that for an agreement to have value, there must be registration. On the facts of this case, he continued, the respondent was the chargee throughout and an interest in a registered charge is indefeasible.

As regards ss. 7 and 12 of the Enactment, the learned trial judge had this to say:

> In fact it is invariably the practice that in the Sale and Purchase agreement it is provided that on the date of completion, the purchaser would be given by the vendor the transfer form together with the document of title and there only remains for the purchaser to effect the registration of the said instrument of transfer. It is upon registration that the title vests in the transferee and indeed it is only when the transferee becomes the registered proprietor that his title will have the indefeasibility which the National Land Code confers. I must say that in this case there is no evidence to show that there was, at any time, a change in the registered proprietorship of the said lands pursuant to the execution of the Property Purchase Agreement. All along the plaintiff was and

is the registered proprietor of the said lands. That being the case I hold that there was no transfer being effected and the proprietorship still remains with the plaintiff. And I would add that neither was there any vesting of right or interest in the defendant of the said lands. To this end I would reiterate what I said in *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446 at p. 455 that "'vesting', as appears in section 7(i), is intended to cover cases where right or interest is indefeasibly vested in a person to form part of his property, thereby enabling him to deal with and alienate such right and interest as his own ... The facts of this case, with respect, do not seem to come within the aforesaid ruling.

On a fair reading of the Malay Reservations Enactment one cannot help but conclude that the intention of the Legislature in the promulgation of the Enactment is "to preclude Malays from parting with their rights and interests in reservation lands ... . And to ensure achieving this very intention certain forms of statutory prohibition have been incorporated in the Enactment in the form of section 7 with the consequences being highlighted in section 12 should there be any infringement thereof.

He had also distinguished the cases referred to by learned counsel for the appellant namely *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v. Wazuraiyah bt. Mohamed* [1988] 1 MLJ 27, *Haji Hamid bin Ariffin & Anor. v. Ahmad bin Mahmud* [1976] 2 MLJ 79, *Manang Lim Native Sdn. Bhd. v. Manang Selaman* [1986] 1 MLJ 379, *Hussanjan v. Haji Nik Yahya bin Nik Daud & Ors.* [1973] 1 MLJ 9, and *Foo Say Lee v. Ooi Heng Wai* [1969] 1 MLJ 47 by stating:

In all these cases, the court was asked to give effect to what have been allegedly agreed to by the parties which would consequently involve the transfer of proprietorship. Unlike in the instant case it was never the intention of the parties, in as much as it can ever be said to be within their contemplation, to involve any transfer of proprietorship. It so happened that the execution of the Property Purchase Agreement and the Property Sale Agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. Hence that would account for the contemporaneous execution of the two agreements; and in fact, it would be observed that the Property Purchase Agreement would be rendered otiose and bereft of any consequential value the moment the Property Sale Agreement was signed. For my part, I would say that that was what both parties had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by the plaintiff.

Accordingly, it is my judgment that the execution of the Property Purchase Agreement had not transgressed the provisions of sections 7 and 12 of the Malay Reservations Enactment since there was no dealing or attempt to deal in the said lands contrary to the provisions thereof.

As regards indefeasibility under s. 340 of the Code, the learned trial judge at p. 23 of his judgment states:

> On the premise I hold that in this case, indefeasibility can only be successfully attacked by evidence which manifests that registration was obtained by "means of an insufficient or void instrument". This means that a party can successfully seek the aid of section 340(2)(b) if it can be shown that there exists a defect or illegality in the execution of the charge documents e.g. if it can be shown that the signature of the chargor is not that of the registered proprietor of the lands or someone authorised by him or that the signature was not properly obtained in that there is present an element of forgery or duress.
>
> There are, however, instances whereby despite registration, the title or interest of any person or body in the land either as proprietor, chargee, lesee or owner of dominant land had been held to be not indefeasible.

At pp. 24, 25 and 26 of his judgment, he had said:

> A scrutiny of the charge documents does not disclose any form of defect or illegality. The charge documents are registered in accordance with the procedure laid down in the National Land Code and such registration does not run counter to the Malay Reservations Enactment either, and this is so by virtue of section 9A and with the inclusion of the defendant in Schedule D, nor the Kelantan Land Enactment by virtue of section 104(i) and also with the inclusion of the defendant in Schedule 26A. (Section 104 is one of the sections in the Kelantan Land Enactment that has been saved upon the coming into force of the National Land Code 1965).
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> Counsel for the plaintiff has also made a rather fleeting comment on the failure to register the Power of Attorney with the Pengarah Tanah & Galian (Director of Lands and Mines) since registration of the charges was carried out by him as the said lands were being held under registry titles. Be that as it may I do not think that such a failure would give rise to any legal impediment to the registration process in view of some directory measures that have to be taken pursuant to Chapters 1 and 2 of Part Eighteen of the National Land Code. And coupled with the presumption of existence of certain facts as illustrated in paragraph (e) of section 114 of the Evidence Act i.e. that judicial and official acts have been regularly performed, I see no reason, on the facts, to question the validity of the registration. Moreover if the plaintiff is mindful of pursuing this issue, he should have joined in as a party, the Pengarah Tanah dan Galian – but he had not!
>
> In view of the foregoing I am satisfied that there is nothing in law and in fact that could deny the indefeasibility accorded by section 340 of the National Land Code to the two charges registered on 8/5/84 by the plaintiff's attorney in favour of the defendant. As evidenced by the charge documents the defendant's right and interest therein only accrue as registered chargee and that is the extent of what the defendant claims.

a Concerning the applicability of equitable principles to the facts of the instant case, the learned trial judge had discussed the question of intention of both parties in signing the Property Purchase Agreement and the Property Sale Agreement which had been made quite clear from the agreements entered into and he was of the view that there was in fact nothing further to add.

b At the end of it all, we saw no reason to disagree with the findings of the learned trial judge and had unanimously dismissed the appeal with costs with the deposit to go to the respondent to account of its taxed costs.

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